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No. 03-1007

In the Supreme Court of the United States

FREEDOM NY, INC., PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner and the United States signed a modification to earlier procurement contracts (Modification 25). The court of appeals held that Modification 25 did not incorporate an alleged side agreement between petitioner and the United States. The questions presented are:

1. Whether in holding that Modification 25 did not incorporate the alleged side agreement, the court of appeals failed to defer to credibility determinations made by the Armed Services Board of Contract Appeals (Board).

2. Whether in holding that Modification 25 did not incorporate the alleged side agreement, the court of appeals complied with the statutory standard for review of Board findings.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-26a) is reported at 329 F.3d 1359. The court of appeals' opinion denying rehearing (Pet. App. 27a-31a) is reported at 346 F.3d 1359. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 32a-99a) is reported at 01-2 B.C.A. (CCH) ¶ 31,585.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2003. A petition for rehearing was denied on October 10, 2003 (Pet. App. 31a). The petition for a writ of certiorari was filed on January 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a contract dispute between petitioner Freedom NY, Inc., and the Defense Logistics Agency (DLA), a component of the Department of Defense. Petitioner's predecessor, Freedom Industries, Inc., signed a written contract to provide the government with combat rations. Pet. App. 2a. Disputes later arose concerning petitioner's obligation to meet delivery deadlines and the government's obligation to make progress payments. *Id.* at 4a.

On May 29, 1986, petitioner's president, Henry Thomas, and the government's contracting officer, Frank Bankoff, signed a four-page document designated "Modification No. P00025." Pet. App. 4a-5a, 64a. Modification 25 released the government from "all claims for all happenings * * * relating to the contract." *Id.* at 4a. In exchange, Modification 25 granted petitioner's predecessor an altered delivery schedule and a price increase. *Id.* at 5a. Modification 25 contained an integration clause specifying that "[b]oth parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement." *Ibid.* (internal quotation marks omitted).

A dispute developed over whether the government and petitioner had entered into a side agreement that became part of Modification 25. Petitioner traces the side agreement to a letter from petitioner dated May 13, 1986, as well as a substantially identical letter from petitioner dated May 28, 1986. Pet. App. 5a. The May 13 letter stated that during contract modification negotiations, "significant matters were discussed relating to Freedom's participation in the [rations] Assembly Program. It was agreed that the understandings reached on those matters were not appropriate for inclusion in

the Mod[ification] but were more appropriately to be addressed in a separate letter." *Id.* at 117a. The letter listed four areas in which the government should assist petitioner and described such assistance as "essential to Freedom's continued participation as a * * * government contractor." *Id.* at 118a. The letter further stated that "[i]t is important that the above understanding be confirmed as soon as practical." *Ibid.*

The day after Modification 25 was signed, DLA's Executive Director, Raymond Chiesa, sent a letter to petitioner's president Thomas rejecting Thomas's suggestion that "parts of our agreement are not reflected in the contract modification." Pet. App. 8a. The Chiesa letter stated: "This is not correct. The agreement reached as a result of our discussion is contained in whole and in its entirety in the contract modification." *Ibid.* The Chiesa letter quoted Modification 25's statement that it embodied "'the complete and total terms and conditions' of the agreement between the parties," and stated that "[a]ny suggestion to the contrary is untrue." C.A. App. 308.

On June 22, 1987, almost one month later, Thomas sent a letter to Chiesa that was nearly identical to the May 13 latter. C.A. App. 316-318. The June 22 letter reiterated that there were understandings relating to petitioner's participation in the rations program and that the understandings were not appropriate for inclusion in the Modification. Pet. App. 66a. The letter again urged "that the above understanding be confirmed as soon as practical." C.A. App. 317-318. Chiesa did not provide such a confirmation.

2. Approximately one year later, the government terminated petitioner's contract for default. Pet. App. 72a. Petitioner appealed to the Armed Services Board of Contract Appeals (Board). Petitioner also sought an

equitable adjustment of $21,959,311 based on alleged breaches of contract and constructive changes by the government. *Ibid.* The government denied petitioner's request, *id.* at 4a, 6a, and petitioner appealed that decision to the Board, *id.* at 73a.

The Board held that the default termination was improper and that it was therefore converted into a termination "for convenience." Pet. App. 6a. The Board rejected petitioner's contract claims, however, holding that the side agreement was not part of Modification 25. *Id.* at 6a-7a. The Board then vacated its decision rejecting petitioner's contract claims. *Id.* at 7a. After a trial directed to petitioner's contract claims, the Board held that the government could not enforce Modification 25's release from liability because the government "did not fulfill its duties under the side agreement" memorialized in Thomas's May 13 and May 28 letter to Chiesa. *Id.* at 94a. The Board found that Thomas's letters were an enforceable "side agreement" to Modification 25 because petitioner would not have signed Modification 25 without agreement to the letters' terms, and because DLA did not notify petitioner of any disagreement with that side agreement until May 30, 1986, when Chiesa sent his letter. *Id.* at 93a-94a.

The Board found that:

> On 29 May 1986, Henry Thomas * * * met with * * * Bankoff. Mr. Thomas had a 28 May 1986 letter to * * * [Chiesa] attached to proposed Modification No. P00025. Mr. Bankoff saw the 28 May date of the letter, and provided an essentially identical * * * 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to

> Mr. Chiesa for approval. * * * DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. * * *

Pet. App. 64a. The Board discredited as having "no probative weight" Bankoff's testimony that "he knew nothing of any side agreement." *Id.* at 65a.

3. The court of appeals reversed and remanded, holding that "the Board erred in invalidating Modification 25 on the ground that the government had breached an alleged side agreement." Pet. App. 12a. The court held that "[w]hen a document is completely integrated, no additional terms may be added, whether consistent or inconsistent, through parol evidence." *Id.* at 13a-14a. The court further held that "integration clauses create a strong presumption" that a contract "is a fully integrated agreement." *Ibid.* That presumption may be overcome, the court concluded, only when "the document is obviously incomplete," or "the merger clause was included as a result of fraud or mistake or any other reason to set aside the contract." *Id.* at 15a. The court of appeals concluded that the presumption was not overcome in this case, and that "the circumstances surrounding the negotiation of Modification 25 support a finding of complete integration." *Id.* at 16a. The court explained that "the parties expressly discussed a possible side agreement," petitioner "specifically requested that the alleged side agreement be memorialized," and "Modification 25 as executed contained no reference to any side agreement and

contained an explicit integration clause." *Ibid.* The court of appeals therefore reversed the Board's holding that the government breached the alleged side agreement and remanded for the Board to consider petitioner's other defenses to Modification 25, *id.* at 17a, including "lack of consideration, duress, unconscionability or fraud." *Id.* at 9a.

4. Petitioner sought panel rehearing and rehearing en banc and argued for the first time that Thomas's letters were "physically attached to, and therefore part of" the copy of Modification 25 signed by the government. Reh'g Pet. 2. The court of appeals denied rehearing. Pet. App. 27a-31a. The court of appeals first held that petitioner's argument concerning physical attachment was waived because petitioner raised it for the first time in its petition for rehearing. *Id.* at 29a.

The court of appeals then stated in dicta that, even if petitioner had timely raised the argument, petitioner would not prevail on the merits. Pet. App. 29a. The court of appeals read the Board as finding that Mr. Thomas had attached the letters "to *his* copies of Modification 25," not to the copy that both parties signed. *Ibid.* The court of appeals held that one party may not bind the other to a contract by unilaterally attaching a document to a contract, unless the other party later signs or ratifies the attachment. *Ibid.*

The court of appeals also observed that two writings may form a unified contract only if the documents "clearly indicate" the parties' intention that they be considered together as a single transaction. Pet. App. 29a (citing Restatement (Second) of Contracts § 132 (1981)). The court explained that "in sharp contrast to this requirement," petitioner's letters stated that they were "*not* part of Modification 25," *ibid.*, and "Modification 25 itself contains an integration clause."

Id. at 30a. The court concluded that, in those circumstances, Modification 25 "cannot be read to make the letters a part of the contract." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-14) that the court of appeals erred in rejecting Board findings that were based on the Board's credibility determinations. For several reasons, that contention does not warrant review by this Court. First, the court of appeals' decision is interlocutory. Second, petitioner waived the argument that underlies the questions it seeks to present. And third, the court did not reject any of the Board's factual findings or credibility determinations. Instead, it correctly held that the Board's decision was based its decision on a faulty legal analysis that failed to give sufficient weight to the effect of the integration clause in Modification 25.

1. As a threshold matter, the court of appeals did not issue a final judgment in this case. Instead, the court vacated the Board's decision and remanded for further proceedings, including adjudication of such defenses to Modification 25 as "lack of consideration, duress, unconscionability or fraud." Pet. App. 9a, 17a. This Court generally awaits final judgment before exercising its certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); Robert L. Stern, et al., *Supreme Court*

Practice § 4.18, at 196 n.60 (7th ed. 1993). To deny certiorari at this time will not preclude petitioner from raising any properly preserved issues in a petition after the entry of final judgment. The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if judgment issues against petitioner, any and all legal claims may be raised in a single, consolidated petition before this Court.

2. Certiorari is also unwarranted because petitioner waived the argument that underlies the questions it seeks to present. Petitioner's contention that the court of appeals failed to defer to the Board's findings and credibility determinations is based largely on petitioner's assertion that the May 13 and May 28 letters were physically attached to the copy of Modification 25 that the government signed. Pet. 4-5, 8. The court of appeals, however, concluded that petitioner waived that argument by failing to present it until its petition for rehearing. Pet. App. 29a. That waiver determination stands as an independent barrier to the consideration of the questions that petitioner seeks to present, and petitioner has failed to raise any distinct question that challenges the court of appeals' waiver determination. See Pet. i.

Furthermore, the application of local waiver rules lies within the court of appeals' discretion, cf. *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 100 n.5 (1991), and petitioner has failed to demonstrate that the court of appeals abused that discretion when it found that petitioner waived the argument that the May 13 and May 28 letters were physically attached to the modification agreement that the government signed.

Petitioner claims that it "could not have 'waived' its argument because it was the appellee in the court of appeals." Pet. 9. But petitioner was also a cross-

appellant, and in any event it cites no authority for the proposition that an appellate court abuses its discretion when it requires appellees to present their arguments in support of the judgment in a timely manner. Petitioner also asserts that it brought the relevant Board findings to the court's attention in its original briefs. But an appellate court may reasonably decide that merely citing a Board finding is insufficient to bring to the court's attention a legal argument in support of a judgment. In any event, the court of appeals' fact-specific application of waiver principles does not present any issue of recurring importance that would warrant this Court's review.

3. Review is also unwarranted in this case because the court of appeals did not base its decision on the rejection of any of the Board's findings or credibility determinations. While petitioner asserts that the court of appeals rejected the Board's finding that the May 13 and May 28 letters were physically attached to the agreement that the government signed, the court of appeals, in fact, simply disagreed with petitioner's characterization of the Board's finding. The court of appeals read the Board to have found only that Mr. Thomas "had attached the May 13 and May 28 letters * * * to *his copies* of Modification 25." Pet. App. 29a (emphasis added).

The court's interpretation of the Board's finding is a reasonable one. While the finding states that the May 13 and May 28 letters were attached to a copy of the agreement, it does not state that they were attached to the agreement *that the government signed.* See Pet. App. 64a. The Board's opinion described the letters as reflecting a "side agreement," *id.* at 93a-94a, strongly suggesting that it viewed the letters as formally separated from Modification 25 itself. And in finding that

the "side agreement" was enforceable, the Board did not rely on its physical attachment to Modification 25, but on two other findings: that petitioner "would not have signed" Modification 25 without the "side agreement" and that "DLA did not notify [petitioner] of any disagreement" until May 30, 1986. *Ibid.* It seems most unlikely that the Board would have based its decision on those two findings had it concluded that the May 13 and May 28 letters were attached to Modification 25 when the government signed it. In any event, the disagreement between petitioner and the court of appeals on the nature of the Board's finding is fact-specific and does not warrant review.

Petitioner also errs in contending that the court of appeals overturned the Board's determinations that Thomas was credible and that Bankoff was not. The court of appeals based its decision on applicable legal principles and the terms of the relevant documents, not on a disagreement with the Board's credibility determinations. In particular, the court held that an integration clause creates a strong presumption that a contract is a fully integrated agreement, Pet. App. 14a, and the terms of the relevant documents in this case confirm that the contract is fully integrated. As the court explained, Modification 25 contains an integration clause, nothing in Modification 25 refers to a side agreement, and the May 13 and May 28 letters expressly state that they are not part of Modification 25. *Id.* at 29a-30a. Because the court of appeals reversed the Board based on its disagreement with the Board's legal analysis and not because it disagreed with the Board's credibility and factual determinations, there is no foundation for either of the questions that petitioner seeks to present. Both of those questions are premised on the incorrect assertion that the court of appeals set

aside Board findings and credibility determinations. See Pet. i.

4. Petitioner also contends (Pet. 14-16) that the court of appeals misapplied principles of contract law. That contention is not within either of petitioner's two questions presented. See Pet. i. It therefore is not properly presented here.

In any event, the court of appeals applied well established principles of contract law in reaching its conclusion. In particular, the court correctly invoked the principle that an integration clause creates a strong presumption that a contract is a fully integrated agreement. Pet. App. 14a. That presumption is supported by the leading authorities, including Williston and the Restatement. *Id.* at 15a & n.3. Petitioner cites authorities for the proposition that other evidence may, in some circumstances, overcome the effect of an integration clause. Pet. 14-16. But none of those authorities suggests that the presumption could be overcome in a case like this where the contract at issue does not refer to any other agreement and the party seeking to add to the contract is relying on a letter that describes itself as "separate." In any event, the court of appeals' fact-specific application of the established presumption in favor of giving effect to integration clauses does not warrant review.

Because of the highly unusual context in which this case arises, petitioner is also incorrect in contending that the court of appeals' decision will significantly affect other government contract cases. Pet. 17. Contrary to petitioner's suggestion, *ibid.*, the court did not hold that documents attached to contract modifications may not become part of the contract. Rather, as discussed above, the court held that petitioner waived any argument based on the attachment of the documents to

the contract, and that, in any event, the documents upon which petitioner relies were not attached to the contract that the government signed. Those conclusions are highly fact-specific and do not present any recurring issue warranting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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